SPEECH

OF

HON. ISIDOR RAYNER,

OF MARYLAND,

IN THE

SENATE OF THE UNITED STATES,

IN SUPPORT OF HIS RESOLUTIONS HOLDING THAT THE EDUCATIONAL INSTITUTIONS OF THE STATES CAN NOT BE INTERFERED WITH BY THE FEDERAL GOVERNMENT IN THE EXERCISE OF ITS TREATY-MAKING POWER.

Wednesday, December 12, 1906.

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SPEECH

OF

HON. ISIDOR RAYNER.

STATE PUBLIC SCHOOL SYSTEM.

Mr. RAYNER. Mr. President, I call up Senate resolution No. 183.

The VICE-PRESIDENT. The resolution indicated by the Senator from Maryland will be read.

The Secretary read the resolutions submitted by Mr. RAYNER on the 4th instant, as follows:

Resolved, That in the opinion of the Senate this Government has no right to enter into any treaty with any foreign government relating in any manner to any of the public school systems of any of the States of the Union; and

Resolved further, That in the opinion of the Senate there is no provision in the treaty between the United States and the Government of Japan that relates in any manner to this subject or in any way interferes with the right of the State of California to conduct and administer its system of public schools in accordance with its own legislation; and

Resolved further, That it is the duty of the President of the United States to notify the Government of Japan and notify any foreign government with whom the question may arise that the public educational institutions of the States are not within the jurisdiction of the United States, and that the United States has no power to regulate or supervise their administration.

Mr. CULLOM. Before the Senator from Maryland proceeds to a discussion of the resolutions I desire to state that immediately after the conclusion of the Senator's speech I will ask the Senate to proceed to the consideration of executive business for the purpose especially of disposing of what is called the "Algeciras treaty."

Mr. RAYNER. Mr. President, the proposition covered by this resolution is to my mind a most important one. The President has stated in his message that the Federal Government possesses some power in connection with the subject-matter set forth in the resolution, and that everything within his power shall be done and all of the forces, military and civil, of the United States, which he may lawfully employ will be employed for that purpose. It is very important therefore that we should know and the country should know, and the President should understand, whether he has any power in the premises at all, because it is quite a serious matter in view of the great calamity that has lately befallen the city of San Francisco for the President to contemplate the bombarding of the city at this time, and to declare war against the boards of county school trustees of California, if there is no justification or pretext upon which such ferocious proceedings can be undertaken.

With great respect and deference to the President, he is exercising a great many functions—executive, legislative, and judicial, lawful and unlawful, constitutional and unconstitu-

tional. If he is possessed of the idea that he is the supervisor of all of the public schools of the various States of the Union, and he seems to be impressed with this idea, because in the very last paragraph of his message he recommends to Congress the establishment of shooting galleries in all of the large public schools of the country, we must either disabuse his mind of this fancy or we must let him know that we agree with him as to the omnipotence of his jurisdiction. If he can take possession of the public schools of California and compel the State to admit to them Japanese students contrary to the laws of California, he could with equal propriety send us an amendment to the Santo Domingo treaty and demand the admission of the negro children of Santo Domingo into the white schools of South Carolina or of any other State of the Union. Of course, if the people have come to the conclusion that everything that the President recommends is right, then there is hardly any use in contesting any of his propositions or recommendations, and instead of conferring upon him the power to give Congress information of the state of the Union, we might confer upon him the function of furnishing his own peculiar views upon the entire state of the universe and recommending any improvements or changes in the general plan of creation that he may deem expedient, from the cradle to the grave. In fact, the President, upon page 29 of his message, anticipates the cradle and makes a recommendation upon the state of the Union that tends to place in his hands the establishment of the birth rate of the country. Now, if we can only supplement this function by giving him complete jurisdiction over the death rate we wili then have a ruler whose ubiquity is uncircumscribed and whose unlimited possibilities are beyond the reach of human contemplation.

I believe that there is a sufficient residuum of common sense and independent thought in the American people to keep the Executive within the prerogatives of his office and to let him quietly and respectfully understand that the Executive chair is not exactly the place from which to deliver exhortations or a course of didactics upon either the natural rights or the infirmities of the human race, and that in his messages and recommendations he ought to confine himself to the functions prescribed by the Constitution.

I desire to say, in passing, that I coincide with everything that the President says in praise of the people of Japan. In the war between Japan and Russia my sympathies were entirely with the Government of Japan, and whatever he says in honor of its marvelous race meets with my own hearty commendation. I always thought it was a great shame that through the kindly and well-intentioned offices of the President, Japan should have been overpowered in the conference room when she had been victorious in every battle upon the land and on the sea, and I think that the dauntless courage and the almost superhuman heroism, against overwhelming odds, of her military and naval forces is without a parallel upon the pages of ancient or modern history. I propose to discuss the question under consideration entirely outside of the particular circumstances that environ it, upon general grounds of constitutional law, and certainly with no feeling of hostility upon my part toward this wonderful people with whom this controversy has arisen.

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THE TREATY WITH JAPAN—COMPARISON WITH CHINESE TREATY.

In my brief argument that I shall address to this body I shall plant myself upon two propositions:

First, that there is no provision whatever in the treaty with Japan that confers the right that the President speaks of, or gives to the Government of Japan the privileges that it claims in connection with the public school system of California or of any other State.

Secondly, the more important question, if there was such a provision in this treaty, or any other treaty conferring this right, the treaty would be void and without any authority upon the part of the United States to make it, and in violation of the Constitution and the treaty-making power of the Government.

The first step that it is necessary for me to take in this discussion is to quote the provisions of the treaty with Japan that have been held to be applicable to the subject in hand, the ratifications of which treaty were exchanged by the respective Governments on the 21st of March, 1895. I will ask the Secretary kindly to read those provisions. It will take but a moment.

The VICE-PRESIDENT. Without objection, the Secretary will read as requested.

The Secretary read as follows:

ARTICLE I. The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property.

They shall have free access to the courts of justice in pursuit and defence of their rights; they shall be at liberty equally with native citizens or subjects to choose and employ lawyers, advocates, and representatives to pursue and defend their rights before such courts, and in all other matters connected with the administration of justice they shall enjoy all the rights and privileges enjoyed by native citizens or subjects.

In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession to personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties, and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects or citizens or subjects of the most favored nation. The citizens or subjects of each of the contracting parties shall enjoy in the territories of the other entire liberty of conscience, and, subject to the laws, ordinances, and regulations, shall enjoy the right of private or public exercise of their worship, and also the right of burying their respective countrymen, according to their religious customs, in such suitable and convenient places as may be established and maintained for that purpose.

They shall not be compelled, under any pretext whatsoever, to pay any charges or taxes other or higher than those that are, or may be paid by native citizens or subjects or citizens or subjects of the most favored nation.

The citizens or subjects of either of the contracting parties residing in the territories of the other shall be exempt from all compulsory military service whatsoever, whether in the Army, Navy, National Guard, or Militia; from all contributions imposed in lieu of personal service; and from all forced loans or military exactions or contributions.

ARTICLE XIV. The high contracting parties agree that, in all that concerns commerce and navigation, any privilege, favor, or immunity which either high contracting party has actually granted, or may hereinafter grant, to the Government, ships, citizens, or subjects of any other State, shall be extended to the Government, ships, citizens, or subjects of the other high contracting party, gratuitously, if the concession in favor of that other State shall have been gratuitous, and on the same or equivalent conditions if the concession shall have been conditional; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other upon the footing of the most favored nation.

Mr. RAYNER. There is not a clause or a line of this treaty that contains by expression or intendment the slightest reference to the public school systems of any of the States of the Union, or confers any rights whatever upon the citizens of Japan to enjoy the privileges of their public educational institutions. There is not a clause or a line, although I understand that the President has been advised to the contrary, that, to the professional mind, would admit of such a construction. The most liberal interpretation of any of its terms does not allow such an interpolation or insertion to be made. The treaty does not even contain the most-favored-nation clause, except in reference to the particular objects that are therein specifically enumerated.

If I have made a mistake upon this point let some Senator upon the floor or some of the President's legal advisers upon the treaty refer me to the clause that carries with it such a construction. Let the President elucidate his message upon this point and give us the language in the treaty that authorized him to state that he had any power or jurisdiction over this subject whatever. It can not be done, because here is the treaty, and no one arises here to justify his construction of it. If there is any decision in the United States that holds that any of the rights granted by the treaty carry with them the privilege to the subjects of Japan of even partaking of the advantages of the educational system of our States, let us have that decision. I have examined them all very carefully that relate to treaties and I find no authority to sustain such a proposition.

Now, let me call your attention to a very peculiar circumstance, and that is the Burlingame treaty, which was made with China, because that does contain such a provision. It is only a few lines. The Burlingame treaty with China, which was proclaimed on February 5, 1870, has the following provision in it:

ARTICLE VII. Citizens of the United States shall enjoy all the privileges of the public educational institutions under the control of the Government of China, and, reciprocally, Chinese subjects shall enjoy all the privileges of the public educational institutions under the control of the Government of the United States which are enjoyed in the respective countries by citizens or subjects of the most-favored nation. The citizens of the United States may freely establish and maintain schools within the Empire of China at those places where foreigners are by treaty permitted to reside, and, reciprocally, Chinese subjects may enjoy the same privileges and immunities in the United States.

"Of the United States." It does not say "of the States," but of the United States.

Mr. BLACKBURN. That is a distinction.

Mr. RAYNER. I say that is a distinction. I am coming to that. Nevertheless it contains a provision that the Japanese treaty does not contain. The Japanese treaty does not give any rights to any public educational institution controlled by the United States.

Now, as I was going to say, the Japanese treaty contains no such provision as this, and the favored clause does not cover it.

Mr. FORAKER. Mr. President——

The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Ohio?

Mr. RAYNER. I do.

Mr. FORAKER. If it would not interrupt the Senator, I

would ask him if he can state the respective dates of those two treaties?

Mr. RAYNER. The Burlingame treaty, February 5, 1870. The ratifications of the Japanese treaty were exchanged by the respective Governments on the 21st of March, 1895, twenty-five years afterwards, and there is not a word of it in this Japanese treaty. The favored-nation clause does not cover it, because this clause is restricted to the objects that are specified in the treaty and no one of these objects relates to educational privileges; and even if there had been a provision in the Japanese treaty similar to the one in the Chinese treaty, it would not apply to this case, because the treaty with China confers educational privileges in educational institutions under the control of the Government of the United States, and neither the educational institutions of California nor of any other State of the Union are under the control of the United States.

The educational institutions of the States are not under the control of the Government of the United States, and therefore, by virtue of this provision in this treaty, the Chinese enjoy no privileges at all. Therefore, if this clause had been incorporated in the Japanese treaty, as I shall show a little farther on, it would not cover the proposition we are now discussing.

Mr. FORAKER. Mr. President——

The VICE-PRESIDENT. Does the Senator from Maryland yield further to the Senator from Ohio?

Mr. RAYNER. I do.

Mr. FORAKER. I wish to call the Senator's attention to the fact that the United States Government has no educational institutions as such, and that immediately following the ratification of the treaty with China, and ever since that, under the clauses granting certain exceptions, Chinese students have been entitled, except as it has been modified by treaty since, to come to this country and seek education in the institutions that are situated within the States and are not at all under the control of the United States Government.

Mr. RAYNER. There is no doubt about that proposition. Any of the States may admit any Chinese or Japanese student or any other sort if they choose who are in the United States. That in entirely within the province of the State, but the question here is a question of alleged discrimination in the public school system of California. Massachusetts or any other State of the Union has a perfect right to admit any Chinese or Japanese who are here. That does not affect the question, I respectfully submit, that I am discussing. I absolutely deny that the admission of these students into the educational institutions of the State is in compliance with and in furtherance of the treaty.

I might rest this entire subject right here, because this is an end of the claim of Japan if the treaty does not, either by expression or intendment, contain the controverted matter, but I have arisen for a larger purpose and a deeper inquiry; and inasmuch as what has taken place here may occur over and over again under the treaty-making power of the United States, I shall now proceed to the more important proposition, and that is that this Government has no power under the Constitution of the United States to make any treaty with any foreign government covering the subject in question, or overriding the legislation of any State of the Union in connection therewith.

THE ISSUES INVOLVED IN THE CONTROVERSY.

Now, let me quote—because I must say that to me it has been the most interesting subject in constitutional law, at least that I have ever examined or been interested in—the sixth article of the Constitution. It is not an academic discussion; it is likely to occur over and over again with all our oriental possessions, because if the President persists in his purpose, the day will come when he will demand that he has the right, either under the treaty-making power or under the amendments to the Constitution, to exercise this privilege in connection with the admission of foreign students into the public educational institutions of the States.

Now, one may read this article of the Constitution without understanding it. Just read it. Let a layman read it. It leaves an impression upon the mind of every man who has not studied the Constitution that the treaty overrides the reserved rights of the States whenever it comes in contact with them. No matter how brilliant the lawyer may be, no matter what his talents or resources may consist of, I do not care for the opinion of anyone who has not thoroughly mastered and analyzed the authorities upon this subject and made the proper discriminations between them:

> This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States—

Now, that is the distinction that the extreme school plants itself on between these two propositions. When it speaks of laws, it says laws which shall be made in pursuance of the Constitution. When the Constitution speaks of treaties, it says that all treaties which shall be made under the authority not of the Constitution, but of the United States. I shall, I think, demonstrate within a few moments that there is no possible distinction in the authorities between these two clauses.

This sixth article, which lies at the bottom of this controversy, reads partly as follows:

> ARTICLE VI. This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

I plant myself firmly and unalterably upon the proposition that we can make no treaty that violates any of the provisions of the Constitution of the United States, that the treaty-making power in the sixth article must be construed *in pari materia* with all the other provisions contained in the Constitution, and if the treaty comes in conflict with any of the limitations of the instrument the treaty must yield and the Constitution prevail.

As a corollary of this proposition I plant myself upon the doctrine that any treaty that violates Article X of the Constitution and infringes upon the reserved rights of the States which have not been delegated to the General Government, and embraces subjects that belong to the States, and that are not necessary to carry out the purposes of the Government as defined in the Constitution, is *ultra vires* and not within the capacity of the Government to make.

It is my opinion that this subject involves one of the most interesting problems that has ever been before this body, and that the suggestion in the message of the President, with great

respect to him, is not of the slightest value here, because in order to arrive at a proper conclusion upon this important inquiry it is necessary to assiduously examine the great mass of precedents, and authorities, and decisions that have been rendered upon the subject, and I am quite sure that I am entirely within bounds when I say that the President has not undertaken this task.

THE SEVERAL SCHOOLS OF CONSTRUCTION.

There are two separate schools of construction upon the subject at issue. These schools are professional schools and schools of commentators and text writers upon the Constitution, and it is not entirely accurate to designate them as the respective advocates of national and States' rights systems.

One of these schools claims that the treaty-making power is an inherent element of sovereignty, and though it is a conferred power in the Constitution it would exist as an essential attribute of this Government without delegation, and that when it is once delegated it need not derive its authority from the Constitution, and that whenever it comes in conflict with the provisions of a State law or a State constitution, by the terms of Article VI of the Constitution the treaty prevails. Some of the adherents of this school have proceeded to the most unfortunate limits in their construction of the treaty-making power, and have held that this power is superior to the Constitution and is not in any manner governed by its inhibitions or limitations.

The second school stands upon the doctrine that the treaty-making power exists for the purpose of carrying out the purposes and objects of this Government as prescribed and defined by the Constitution, and that no treaty is valid that violates the Constitution or that under its provisions surrenders the rights reserved and belonging to the States.

I am a disciple of the second school, not alone as a party man, but as a student of Constitutional history, and I proceed now to give the reasons for the faith that is in me.

The most instructive step that I can take in this discussion is to give, in the language of their advocates, the two standards that separate these two political creeds, so that the distinguishing features between them can be clearly and fully comprehended and understood.

Mr. Charles Henry Butler, the present reporter of the Supreme Court, and a man of great learning and industry, in a valuable text-book that he has written upon the treaty-making power of the United States, which I think is mainly wrong in the conclusions that it reaches, but which is full of the most interesting information upon the subject, thus states his own views and the views of those who belong to the first school of treaty-making power interpretation that I have referred to:

First. That the treaty-making power of the United States, as vested in the central Government, is derived not only from the powers expressly conferred by the Constitution, but that it is also possessed by that Government as an attribute of sovereignty, and that it extends to every subject which can be the basis of negotiation and contract between any of the sovereign powers of the world, or in regard to which the several States of the Union themselves could have negotiated and contracted if the Constitution had not expressly prohibited the States from exercising the treaty-making power in any manner whatever and vested that power exclusively in and expressly delegated it to the Federal Government.

Second. That the power to legislate in regard to all matters affected by treaty stipulations and relations is coextensive with the treaty-making power, and that acts of Congress enforcing such stipulations which,

in the absence of treaty stipulations, would be unconstitutional as infringing upon the powers reserved to the States, are constitutional, and can be enforced, even though they may conflict with State laws or provisions of State constitutions.

Third. That all provisions in State statutes or constitutions which in any way conflict with any treaty stipulations, whether they have been made prior or subsequent thereto, must give way to the provisions of the treaty, or act of Congress based on and enforcing the same, even if such provisions relate to matters wholly within State jurisdiction.

The tenets of the school in which I have been trained are succinctly stated in a masterly way by that eminent constitutional lawyer, the Hon. John Randolph Tucker, in a report that he rendered to the Forty-eighth Congress, and which reads, in part, as follows:

The language of the Constitution of the United States which gives the character of "supreme law" to a treaty, confines it to "treaties made under the authority of the United States." That authority is limited and defined by the Constitution itself. The United States have no unlimited, but only delegated authority. The power to make treaties is bounded by the same limits, which are prescribed for the authority delegated to the United States by the Constitution. To suppose that a power to make treaties with foreign nations is unlimited by the restraints imposed on the power delegated to the United States would be to assume that by such treaty the Constitution itself might be abrogated and the liberty of the people secured thereby destroyed. The power to contract must be commensurate with and not transcend the powers by virtue of which the United States and their Government exist and act. It can not contract with a foreign nation to do what is unauthorized or forbidden by the Constitution to be done. The power to contract is limited by the power to do. (3 Story, Com. on Const., sec. 1501.)

It is on this principle that a treaty can not take away essential liberties secured by the Constitution to the people. The treaty power must be subordinate to these. A treaty can not alien a State or dismember the Union, because the Constitution forbids both.

In all such cases the legitimate effect of a treaty is to bind the United States to do what they are competent to do and no more. The United States by treaty can only agree with another nation to perform what they have authority to perform under the constitutional charter creating them. The treaty makes the *nexus* which binds the faith of the Union to do what their Constitution gives authority to do. A treaty made under that authority may do this; all it attempts to do beyond it is *ultra vires*—is null, and can not bind them.

In this admirable report and careful review of the treaty-making power Mr. Tucker remarks that—

If the treaty-making power extends to the limits that are claimed for it by the advocates of an inherent right, then a treaty may borrow money, regulate commerce, coin money, establish post-offices, and provide for raising armies and navies of the United States, and may thus annul or paralyze all the powers of Congress, and admit a foreign nation to exact, with the alternative of war, a compliance with these sweeping stipulations in the internal government of the people of the United States.

I am aware of the fact that some of the conclusions reached by this eminent statesman in this report have been assailed at times, but I am also aware of the fact that the main proposition upon which he stands, and from which I have quoted in the first instance, has never been impeached nor impugned by any Federal or State authority that I know of.

'A TREATY CAN NOT VIOLATE THE CONSTITUTION.

I want to proceed one step further in the particular point that I am now discussing, and I desire to address these remarks to the extreme advocates of the doctrine of an "unlimited treaty-making power."

Let me take subsection 8 of section 9 of Article I of the Constitution of the United States, which provides "that no title of nobility shall be granted by the United States." Is there anyone

here that believes we would have the right in a treaty to grant a title of nobility to the subject of a foreign government?

Subsection 4 of section 1 of Article II of the Constitution provides "that no person except a natural-born citizen * * * shall be eligible to the office of President." Does anyone here believe that we could make a treaty with a foreign power abrogating this section in its interests?

Article I of the amendments provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Is there anyone of the opinion that we could make a treaty with a foreign nation admitting their subjects to our shores, and then, in the same treaty, provide that they should not have the privilege of exercising their religious belief?

Mr. President, I am talking to the extreme advocates of this doctrine. I am coming to the middle class presently. I am taking now the doctrine of the men who claim that the treaty-making power is an inherent power, and is not circumscribed either by the delegated powers or by the limitations or inhibitions of the Constitution. I will come to the men of more moderate views of the first school in a few moments. I am planting this argument now upon the doctrine that the treaty-making power is an inherent power that is not governed or controlled at all by the Constitution of the United States.

Mr. BEVERIDGE. Mr. President——

The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Indiana?

Mr. RAYNER. Certainly.

Mr. BEVERIDGE. Might not the power be inherent in sovereignty and at the same time be limited by the Constitution?

Mr. RAYNER. Never. It can not lie in grant and lie in sovereignty. It must either lie in sovereignty or lie in grant. There is no such thing as a granted power under the Constitution carrying within its terms an inherent and sovereign power. I utterly deny the suggestion of the Senator from Indiana. Whatever inherent powers exist have been merged forever in the granted powers of the Constitution. It must be either one or the other.

Mr. BEVERIDGE. That was not my question, although I am happy to hear the Senator upon that.

Mr. RAYNER. Then I misunderstood the Senator.

Mr. BEVERIDGE. The question was, Might not the power be inherent in sovereignty and at the same time be limited by the prohibitions of the Constitution?

Mr. RAYNER. There is not an inherent power in the Government of the United States, because the Government of the United States is not a government of inherent powers. I deny that the Government of the United States has any inherent powers save the power to exist and to perpetuate itself, and while it might be inherent and still limited, the fact is it is not inherent. That answers the question.

Mr. CARMACK. Mr. President——

The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Tennessee?

Mr. RAYNER. I do.

Mr. CARMACK. I wish to suggest to the Senator from Maryland that each of the States prior to the formation of the Constitution of the United States possessed this treaty-making

power, and that the General Government possesses it now only by reason of its delegation by the States.

Mr. CULBERSON. The States possessed it inherently.

Mr. CARMACK. They possessed it inherently; and the General Government gets it by delegation from the States.

Mr. RAYNER. I was coming to that proposition in a moment. I think the Senator from Tennessee states that proposition a little too broadly—that is, that the States granted to the United States all the powers they possessed.

Mr. CARMACK. I did not say that.

Mr. RAYNER. I beg pardon. I understood the Senator to say that the States had granted to the United States all the treaty-making power.

Mr. CARMACK. No; I did not mean that; but all the powers the General Government possesses in that respect are derived from the grant by the States——

Mr. RAYNER. Undoubtedly.

Mr. CARMACK. That all the treaty-making power was in the States prior to the formation of the Constitution. Each State possessed the treaty-making power. When the Constitution was formed the States delegated to the General Government the treaty-making power, and the treaty-making power possessed by the General Government is measured by the extent of that delegation.

Mr. FULTON. May I ask the Senator from Tennessee [Mr. CARMACK] a question?

The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Oregon?

Mr. RAYNER. I wish the Senator would ask me the question.

Mr. FULTON. Then I will ask the Senator if that delegation of power to the General Government, when exercisable, is nevertheless not restricted by the prohibition on the General Government contained in the Federal Constitution?

Mr. RAYNER. Mr. President, I am coming to the argument of that question in a moment.

I want, first, to say something in reference to the suggestion of the Senator from Tennessee [Mr. CARMACK]. Of course, the Senator from Tennessee recollects that in the Articles of Confederation it was provided that no treaty should be made unless nine of the States consented; but the suggestion made by the Senator is absolutely correct as to the proposition upon which I stand, that all powers of the Constitution—the treaty-making power and every other power—are derived from the powers given by the States. Of course, I can not admit that they have given all their treaty-making power, because they have only given the treaty-making power in connection with the delegated power, although the State itself has no right to make a treaty under the Constitution. While I can not admit that the States gave all the treaty-making power, I will undoubtedly admit that the States gave every treaty-making power that was necessary for the purpose of carrying out the delegated powers of the Constitution, and there are no other powers necessary.

Mr. BEVERIDGE. Will the Senator allow me?

Mr. RAYNER. In a moment. I have examined, I think, every treaty in existence between this Government and every other government, and I can—though I do not propose to do it now, because it would take too much time—but I can now show,

and I am willing to trace every subject-matter in those treaties ever made with any foreign government to some delegated power contained in the Constitution of the United States. I challenge the Senator from Indiana to point me to a single case that will show this Government has ever made a treaty passed upon by the courts, and held to be valid by the courts, that was not for the purpose of carrying out the delegated powers of the Constitution conferred upon the United States.

Mr. BEVERIDGE. Mr. President——

Mr. RAYNER. Let me give one more quotation, and then I will yield. Section 1 of Article XIII of the amendments to the Constitution provides that—

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

Is this an inherent power? Is there any power under the treaty-making power, except the power to carry out the delegated powers of the United States? According to Mr. Butler and the various lecturers upon the revised edition of the United States Constitution, who agree with him, it is claimed that the power is not bound by the limitations of the Consitution. I ask, is there anyone here who believes that we could have put a provision into the treaty of Paris providing for a system of slavery in the Philippine Islands? If it is an inherent power, if it does not depend upon the delegated powers, if it is a sovereign power beyond and above the Constitution, then we can violate every article in the Constitution, and there would be no inhibition upon us at all from violating this particular provision and instituting or continuing, as I believe we have done anyway in a portion of the Philippine Islands—the Senator from Indiana will know more about that question than I do—the system of slavery that exists in a certain portion of those islands.

Mr. BEVERIDGE. I want to ask the Senator a question before he leaves that subject.

The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Indiana?

Mr. RAYNER. Certainly.

Mr. BEVERIDGE. It was rather an interesting statement the Senator made, that he did not concede that the States had delegated away all of their treaty-making power. Under section 10 of Article I of the Constitution, what part of the treaty-making power does the Senator think any State has?

Mr. RAYNER. No State has any treaty-making power, except as provided in the Constitution. The States have delegated to the Federal authorities all the treaty-making power that it is necessary for the Government to have in order to carry out the delegated powers of the Constitution.

Mr. BEVERIDGE. I understood the Senator to say a moment ago, in answer to the Senator from Tennessee [Mr. CARMACK], that he did not concede that the States had parted with all of their treaty-making powers. I merely call his attention to section 10 of Article I of the Constitution.

Mr. RAYNER. I said the Constitution prohibits the States from making a treaty.

Mr. BEVERIDGE. Certainly.

Mr. RAYNER. The Federal Government can make every treaty, and the States have given the Government the right to

make every treaty that is necessary to carry out its delegated powers, and you must take the treaty-making power in pari materia with the delegated powers that are given to the Government. I can not make it any plainer than that. I will give you what Mr. Adams says on that presently, and a number of your friends and some of my friends—Mr. Jefferson and others—and, I think, you will agree with me. I have stated the proposition almost in their identical language. I say that the States have given to the Federal Government the right to make treaties, but they have only given it the right to make such treaties as carry out the delegated powers of the Constitution, and they have never given it the right to make any treaty that interferes with the reserved rights of sovereign States acting within their own borders.

Mr. BEVERIDGE. Then I understand the Senator does not contend that the States have reserved to themselves at all any portion of the treaty-making power. That is made clear.

Mr. RAYNER. Look at the Constitution; that settles the rights of the States. The Government can make any treaty that carries out the purpose of the Government. My argument is that you must take the treaty-making powers together with the delegated powers, and you can not construe one independently of the other.

Mr. FORAKER. Mr. President——

The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Ohio?

Mr. RAYNER. I do.

Mr. FORAKER. I only want to remark, if I may be permitted to do so, that the result of the Senator's contention, as I understand, is that that part of the old treaty-making power which the States originally possessed has become dormant or has been, by the provisions of the Constitution, placed in abeyance, does not belong to anybody, and can not be exercised by any governmental authority anywhere.

Mr. RAYNER. The Senator from Ohio evidently has misunderstood me. I will state the proposition over again.

Mr. FORAKER. I hope the Senator will not——

Mr. RAYNER. I want to answer the Senator's observation. There is no dormant power anywhere, because the Government of the United States contains the full treaty-making power for the purpose of carrying out all of its delegated powers, and there is no dormant power any place under the Constitution. Every power under treaties necessary to perfect the delegated powers has been parted with by the States, and the States have parted with their treaty-making power, but I repeat again that the treaty-making power must be construed in pari materia with the delegated powers.

Mr. BACON. Will the Senator permit me a moment?

The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Georgia?

Mr. RAYNER. Yes.

Mr. BACON. In connection with his suggestion as to whether or not the powers are dormant, I wish to call the attention of the Senator to the fact that the Constitution does contemplate that there may be questions in which a State may be interested and which may require a compact or a treaty which are not Federal questions; but its exercise of any power in connection with that is restricted and made dependent upon the consent of Con

gress. I will read the section to which I allude as illustrative of the question propounded by the Senator from Ohio in connection with the contention of the Senator from Maryland. Article 1, section 10, paragraph 3, of the Constitution, to be found on page 201 of the present edition of the Constitution and Manual, reads as follows:

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

If the Senator will pardon me just a moment, the point in connection, I think, with the subject under discussion is illustrative of the fact that it was in the contemplation of the Constitution that there were subjects-matter possible of compacts or treaties in which the States might be direcly interested and which did not relate to the General Government in its Federal capacity, but which subjects were in their treatment by the States or in dealing with by the States so restricted that there could be no action with reference thereto unless Congress should consent; in other words, that there were questions which could be and properly would be the subjects-matter of treaties interesting the States directly, but which were subsidiary entirely to the general power of the Government and required to be subject to its supervision.

Mr. RAYNER. Mr. President, I was coming to that in a moment. While I am quite willing to submit to any interruptions, I think there will be plenty of questions to ask me when I get into the cases.

Mr. CULBERSON. Will the Senator allow me just to read another section of the Constitution which will clear up this particular matter?

The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Texas?

Mr. RAYNER. I was going to read all of those sections, I will say to the Senator. I have the clause in mind to which he refers.

Mr. CULBERSON. What clause is it?

Mr. RAYNER. There are three clauses I was going to read from the Constitution. The first clause is in relation to the right of the President and the Senate to make a treaty; the second clause the Senator from Georgia [Mr. BACON] has read, and the third clause is the clause prohibiting a State from making a treaty.

Mr. CULBERSON. That is the one I desired to read.

Mr. RAYNER. Do not misunderstand my purpose. I am willing that the Senator should interrupt me.

Mr. CULBERSON. It is very pertinent, Mr. President, I think, in this connection, and it would be well to read it. It is section 10, Article I, of the Constitution, which declares:

No State shall enter into any treaty, alliance, or confederation.

Mr. BEVERIDGE. That is the section to which I specifically called the Senator's attention a moment ago when the Senator ventured the remark that the States had not parted with all their treaty-making power.

Mr. RAYNER. Do not let the Senator from Indiana misunderstand that proposition. Do not let us get him wrong——

Mr. BEVERIDGE. No.

Mr. RAYNER. Because I understand the Senator delivered a lecture on that subject, and while I am against the lecture, I do not want the Senator from Indiana to misconstrue what I have said on this subject. I say, again and again, the States have granted to the Federal Government all their treaty-making powers that are necessary to carry out the purpose of the Government as constituted by the Constitution. That is the exact language of Mr. Jefferson, and I can not improve on it. It has never been improved on, except by Mr. Butler, who says Jefferson has been reversed. Jefferson has never been reversed by anybody except Mr. Butler, and I will take Jefferson against my friend and the distinguished reporter of the Supreme Court on that subject.

This brings me right down to the precise point involved in this discussion, and that is to the tenth article of the amendments, which reads as follows:

> ARTICLE 10. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

Have we a right to violate the Constitution of the United States and incorporate in a treaty powers not delegated to the United States, powers that are not necessary and proper for carrying into execution the powers that are delegated, and barter away the privileges and rights reserved to the States respectively by virtue of the instrument and of the tenth amendment thereto that I have just referred to? The power of a State to regulate its public school system is clearly among its reserved powers. Have we, therefore, a right to provide in a treaty that the citizens of foreign lands shall possess privileges in the public schools of the States that are prohibited either by the Constitution or by the laws of the State in which they are claimed? If we can, in defiance of the laws and constitution of a State incorporate any such provision in a treaty so as to bind the State, then we can undoubtedly deprive the State of every reserved right that it possesses, and rescind and annul its laws and its constitution whenever they come in conflict with the treaty-making power. I trample upon this appalling doctrine. If ever such a deformity as this should creep into our judicial decisions it would disfigure the Constitution to such an extent that its features would no longer be capable of recognition. It would annul the charter; it would frustrate the intention of the men who framed it; it would undermine the entire framework of the instrument, and it would convert us from a constitutional government into a dictatorship, with the States in abject servitude to Federal power, and with the Executive in practical control of the destinies of the Republic.

THE LEADING AUTHORITIES UPON THE SUBJECT.

I want now to go over the cases. I know it is monotonous in the Senate to read cases, and I will not read them, because I think I can recollect them. There are two lines of cases. The first line is made up of the three cases of Ware *v.* Hylton (3 Dallas), the case of Chirac *v.* Chirac, from my own State (2 Wheaton, 259), and a case in Virginia, Fairfax *v.* Hunter (7 Cranch, 603).

Ware *v.* Hylton is the great case that is quoted against the proposition that I am arguing here now. That case was argued by Marshall. It was the only case that Marshall ever argued

in the Supreme Court of the United States. It was decided by Justices Chase, Patterson, Cushing, Wilson, and Iredell, and the case covers 100 pages. Let me see if I can give it in a few words.

Virginia had confiscated the debts of all British creditors. After the Revolution Congress made a treaty with Great Britain providing that British subjects should have the right to prosecute their claims in the courts of the United States without impediments. There was a conflict between the act of Virginia confiscating the debts of British subjects and the treaty of the United States giving British subjects without impediment the right to sue. The United States courts held that the treaty prevailed and that the laws of the State of Virginia were in conflict with it and were void. I give you that case in a very short compass. I want to take the cases of Fairfax *v.* Hunter and Chirac *v.* Chirac.

Mr. MALLORY. Mr. President——

The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from Florida?

Mr. RAYNER. Certainly.

Mr. MALLORY. In the case of Hylton *v.* Ware the Supreme Court expressly declined to give an opinion as to whether a treaty could override the Constitution.

Mr. RAYNER. I am coming to that in a minute. I have not finished with Ware *v.* Hylton. I have had Ware against Hylton in my mind for pretty nearly forty years now, and I am going to finish with it in forty seconds, if I can. It occupies a hundred pages in the reports; so I do not intend to read it.

I am coming now to the other cases in the first line. Maryland passed a law, and so did Virginia, that aliens could not hold property. The Government made a treaty with France that aliens could hold property in the United States. The laws of Virginia and Maryland came into conflict with the treaty, and the Supreme Court of the United States held that the treaty prevailed. Those are the two cases that are cited to sustain the proposition that Mr. Butler is contending for and against the proposition that I am advocating. I want to say one word about those cases. The treaty referred to in Chirac *v.* Chirac and in Ware *v.* Hylton was made under the Articles of Confederation. It was not made under the Constitution at all. If you will look at the sixth article of the Constitution, you will see that it ratifies all treaties that have been made. This was one of the treaties that it ratified, because it was a treaty under the Articles of Confederation, and, furthermore, Justice Cushing, in uniting in the opinion of the court, says that Virginia was a party to the treaty, and being a party to the treaty she could not abrogate her own act, and she was estopped by having participated in it and having been a party to it. We all recollect that under the Articles of Confederation it was necessary that nine States should assent to a treaty before it became effective.

Let me get to the second line of cases, which the Senators from the Pacific coast will recollect without my going into details. Both California and Oregon passed laws in reference to this question. California passed a law that no Chinese laborers should be employed by any corporation, and Oregon passed a law that Chinese laborers should not be employed upon the public works of that State. The question came up under the Chinese

treaty—and the cases are reported in 5 and 6 Sawyer; they are circuit court cases—the question came up under the Chinese treaty, Does the treaty prevail or does the law of California and the law of Oregon prevail? Is the law of California a valid law which provides that no Chinese laborer shall be employed by any corporation in the State of California? Is the Oregon law a valid law which provides that no Chinese laborer shall be employed upon any public works in Oregon? The Supreme Court said no. Why? Because, they held, the treaty having provided that Chinese at that time should have the right to live here, that the right to live here carried with it the right to labor here; that a man can not live without earning a living; that if we had the right by treaty to give them the privilege of coming here, the treaty by intendment and construction carried with it their right to earn a living; but the court never touched upon the reserved rights of the States.

Now, I want to take up the last case I am going to quote on the other side of this subject, because I want to argue it fairly. I come now to the decision in 92 United States, that most unfortunate decision of the Supreme Court of the United States. It does not trench at all upon the argument I am now making. California provided that no woman of ill repute should come into the ports of California. That is the Freeman case (92 U. S). What did the Supreme Court decide there? As the Senator from Wisconsin knows, they did what they had never done before. They went back of that statute. They never construed the statute according to the language of the statute, but they held that California intended, by that provision of her law, to exclude Chinese women, although there was not a word said about Chinese women or women of any other race. It was one of those peculiar cases in which the Supreme Court of the United States has gone into the motives of a State legislature in order to determine the validity of her statutes. But, Mr. President, when they come to decide that case they never touched upon the reserved rights of the State. If you will examine the Freeman case you will see that the Supreme Court held in that case that it was a regulation of commerce, and that California had passed a statute violating that article of the Constitution which gives the Congress of the United States the right to regulate commerce with foreign nations.

Now I want to give my cases. I could give numbers of other cases, but before I give my cases, I wish to read one or two extracts from this author whom I have quoted here upon several occasions, to show how he contradicts himself upon this point, and how, when he is arguing against himself, he is finally forced to the conclusion that he has made a mistake, and that you can not make a treaty which interferes with the reserved rights of the State; and the only question to his mind is whether it is a reserved right of the State. If it is once settled that it is, when you once admit it is a reserved right of the State, then it can not come within the treaty-making power, because you can no more violate article 10 of the Constitution than you can violate any other article of the Constitution in connection with its inhibitions and limitations.

Let me read a very peculiar passage from this author against himself. I am quoting now from a hostile authority to substantiate the propositions for which I am contending, because I

have the most eminent authorities in the country to sustain the propositions upon which I stand.

I read from page 31 of Butler on the Treaty-Making Power, a most interesting book. If it were not all wrong on this point it would be the most valuable book upon the subject that we have in the United States. Upon page 31, section 344, of this work we find the statement which I shall read, made by my friend, Mr. Butler, whom I know personally very well, and of whom I think very highly, and I do not intend that any criticism of mine upon his work shall in the slightest degree reflect upon his great industry and talent as a lawyer and as an author. He represents the same school that my friend the Senator from Indiana represents—the school that believes that we are a government of inherent sovereignty.

Sec. 344. *State statutes upheld; Chinese laundry cases.*—It must not be presumed, however, that the Federal courts have always interfered to prevent State action in regard to matters which are wholly under their control, and that they have used the treaty-making power as an excuse for interfering in their internal affairs. In 1885 the same learned justice of the Supreme Court who had declared the San Francisco queue ordinance invalid sustained a municipal ordinance of San Francisco imposing certain regulations and restrictions upon laundries, and which was as undoubtedly aimed directly at the Chinese as the queue ordinance had been. The Supreme Court held, however, that the regulation of laundries was a matter which came within the right of the municipality, and that treaty stipulations as to rights to live and labor should not be used to prevent the proper enforcement of municipal regulations.

Upon page 56 we find the following statement:

The Supreme Court has, in regard to treaties, as it has in regard to Federal statutes, ever kept in view the exclusive right of States to regulate their internal affairs.

Upon page 350, section 455, we find this remarkable statement from the same author, which seems to be in direct conflict with almost every other statement that he has made in this valuable work upon this subject:

Sec. 455. *Power must be limited, as no unlimited powers exist.*—

He has been arguing in 454 sections that unlimited powers exist, and when he comes to the four hundred and fifty-fifth section he says the powers must be limited, as no unlimited powers exist; and in order to apologize for the remarks he has made in the antecedent sections he goes on to say:

After perusing the foregoing chapters the reader may think he is justified in presuming that the author does not consider that there are any limitations whatever on the treaty-making power of the United States, either as to the extent to or subject-matter over which it may be exercised.

I should think we were justified in presuming so when he has argued that question in the sections which have preceded this section.

Then says the author:

Such, however, is not the case; the fact that the United States is a constitutional government precludes the idea of any absolutely unlimited power existing.

He has never said that before. He continues:

The Supreme Corut has declared that it must be admitted as to every power of society over its members that it is not absolute and unlimited; and this rule applies to the exercise of the treaty-making power, as it does to every other power vested in the Central Government. The question is not whether the power is limited or unlimited, but at what point do the limitations begin.

If the author had said that in the first section, it would have saved him the trouble of writing the greater part of his book.

Now, Mr. President, let me come to the citation of my cases, and I will finish them very briefly, although it is a subject very difficult to cover in the space I am devoting to it. I have the cases where this identical question has arisen—where the Supreme Court itself, and in approval of State authorities, has held not only that a reserved right of the State does not come within the treaty-making power, but has held that this right of a State to admit a particular class of people into its educational institutions is a reserved right of the State, and the Government has no control over it whatever, either in the treaty-making power or in statutes.

Let me read an extract from the case of Geoffroy *v.* Riggs (133 U. S., 267), as follows:

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the Government or of its departments, and those arising from the nature of the Government itself and of that of the States.

In 5 California, in the case of The People *v.* Gerke, the court, in its opinion, said:

> The language which grants the power to make treaties contains no words of limitation; it does not follow that the power is unlimited. It must be subject to the general rule, that an instrument is to be construed so as to reconcile and give meaning and effect to all its parts. If it were otherwise, the most important limitation upon the powers of the Federal Government would be ineffectual, and the reserved rights of the States would be subverted. This principle of construction, as applied, not only in reference to the Constitution of the United States, but particularly in the relation of all the rest of it to the treaty-making grant, was recognized both by Mr. Jefferson and John Adams, the two leaders of opposite schools of construction.

I now refer to the case of The People *v.* Gallagher, in 93 New York Reports, page 438, and to the case of Roberts *v.* The City of Boston, 5 Cushing, 198, both of which cases have been cited with approval by the Supreme Court of the United States, and in which the question whether a separation of the races in the public schools was a violation of the "privileges and immunities" guaranteed by the Constitution came before the courts. I quote from the first case:

> The school authorities have power, when, in their opinion, the interests of education will be promoted thereby, to establish schools for the exclusive use of colored children; and when such schools are established and provided with equal facilities for education, they may exclude colored children from the schools provided for the whites.
>
> The establishment of such separate schools for the exclusive use of the different races is not an abridgement of the "privileges or immunities" preserved by the fourteenth amendment of the Federal Constitution, nor is such a separation a denial of the equal protection of the laws given to every citizen by said amendment.
>
> It seems that the "privileges and immunities" which are protected by said amendment are those only which belong to the citizen as a citizen of the United States—

I beg my friends to draw the distinction here between a citizen of the United States and a citizen of a State, because a man may be a citizen of the United States without being a citizen of any State.

> those which are granted by a State to its citizens and which depend solely upon State laws for their origin and support are not within the constitutional inhibition and may lawfully be denied to any class or race by the State at its will and discretion.
>
> It seems also that as the privilege of receiving an education at the expense of the State is created and conferred only by State laws, it may be granted or refused to any individual or class at the pleasure of the State.

Mr. FULTON. May I ask the Senator from Maryland a question?

Mr. RAYNER. Certainly.

Mr. FULTON. I wish to say first that I am in accord with the Senator's views—that the Federal Government can not by treaty invade the right of a State to regulate its own school system. But a question has occurred to my mind, and I wish to ask the Senator from Maryland if it has occurred to his; and if so, whether he has reached a conclusion on it. It is this: Can the Congress and the President, in the exercise of the treaty-making power, invade the rights of a State—what we will term the "reserved" rights of a State—to any greater extent than it can by direct legislation? We will concede, I think, for instance, that Congress may not by direct legislation change the laws of a State providing who may hold property within the State—who may own real estate. That is a matter concerning which a State ordinarily would have the right to legislate, and concerning which the Congress could not interfere by direct legislation. Yet the Supreme Court has held that by a treaty a law of a State in that regard may be annulled.

Now, then, the question which has arisen in my mind is to what extent may the treaty-making power invade the rights of a State beyond what Congress may invade them by legislation, or can it?

Mr. RAYNER. And that, Mr. President, is not only a very pertinent question, but it is a question that would present a great deal of difficulty in its solution if certain cases in the Supreme Court, which I am going to quote, did not fully cover it. That is the point I am coming to, Can the United States by treaty go beyond the delegated powers of the Constitution? Admitting it can not violate the Constitution, is the treaty-making function circumscribed by the Constitution? The first case that arose was a California case, which was quoted by the Supreme Court with approval. It was The People, ex rel. the Attorney-General, *v.* Nagle. I read from 1 California, 232.

The State of California, as the Senator from California will remember, had imposed a license upon foreigners engaged in working gold mines in that State, and the question arose whether California, under the treaty, had the right to pass such a law. The court said:

OPINION OF COURT.

But even if the provisions of the statute did clash with the stipulations of that, or of any other treaty, the conclusion is not deducible that the treaty must therefore stand and the State law give way. The quesion in such case would not be solely what is provided for by the treaty, but whether the State retained the power to enact the contested law or had given up that power to the General Government. If the State retains the power, then the President and Senate can not take it away by a treaty. A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty-making department and in relation to those subjects the jurisdiction over which has been exclusively intrusted to Congress. When it transcends these limits, like an act of Congress which transcends the constitutional authority of that body, it can not supersede a State law which enforces or exercises any power of the State not granted away by the Constitution. To hold any other doctrine than this would, if carried out into its ultimate and possible consequences, sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective States or which should even undertake to cede away a part or the whole of the acknowledged territory of one of the States to a foreign nation.

In addition to this case, I want to refer to the important cases in 119 Federal Reporter, page 381, and in 5 Howard, page 613, to the opinion of Justice Daniel, which is concurrent upon the proposition from which I quote, and which reads as follows:

This provision of the Constitution, it is to be feared, is sometimes applied or expounded without those qualifications which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the Federal Government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, in intention or in fact, ceded to the General Government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, to be valid, must be made within the scope of the same powers, for there can be no "authority of the United States," save what is derived mediately or immediately, and regularly and legitimately, from the Constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State.

I wish to refer now to a case in 118 Federal Reporter. This was a case where a Chinese girl filed a petition for a mandamus against the public school trustees of San Francisco, I think, asking admission into the white school. It was denied. The case went to the United States court, and the court said that she had no right to be admitted into the white public schools of California; that there were schools set apart for her, and she could go into those schools. Is it not a strange thing that California can pass a law providing that the Chinese children who live there shall be separated in the schools, and can not pass a law that the Chinese children who do not live there, those who shall come there hereafter shall be not separated, but that they must be put in the white schools?

Mr. FLINT. Mr. President——

The VICE-PRESIDENT. Does the Senator from Maryland yield to the Senator from California?

Mr. RAYNER. Certainly.

Mr. FLINT. The language of the statute is "Mongolian," not "Chinese."

Mr. RAYNER. Yes, "Mongolian."

Mr. FLINT. It includes Japanese.

Mr. RAYNER. The Japanese hold that they are not Mongolians; but outside of that, I am on a proposition of law now. The Senate will sustain me in the proposition, without quoting the cases that the court has absolutely decided that children of Chinese parents have no right to go into the same schools with white children in California; and that has been approved of by the Supreme Court of the United States. How is it possible to hold that the Chinese children who live there can be separated and segregated, but that children living in China or Japan who may come here can not be separated and segregated, but must go into the white schools?

Let me get back again now to what Jefferson said—it is just three lines. He said it long ago, but not too long ago to be forgotten, and this is the proposition on which Mr. Butler says Mr. Jefferson has been reversed:

By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaty and can not be otherwise regulated. It must have meant

to except out of these the rights reserved to the States, for surely the President and Senate can not do by treaty what the whole Government is interdicted from doing in any way.

That is a concise but a stately statement of the proposition upon which I have planted myself to-day.

The last case I shall cite is the case known as the "Dispensary case," decided by Judge Simonton in the South Carolina circuit (54 Fed. Rep., 969). It is so pertinent to the subject-matter of this discussion that I shall quote an extract from the opinion of Judge Simonton thereon:

It is urged on behalf of these complainants that they are Italian subjects, and are protected by the treaty stipulations between Italy and the United States. The language of the treaty on this point is as follows:

"Art. 2. The citizens of each of the high contracting parties shall have liberty to travel in the States and Territories of the other; to carry on trade, wholesale and retail; to hire and occupy houses and warehouses; to employ agents of their choice, and generally to do anything incident to or necessary for trade upon the same terms as the natives of the country, submitting themselves to the laws there established.

"Art. 3. The citizens of each of the high contracting parties shall receive in the States and Territories of the other the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

Under these articles the complainants have the same rights as citizens of the United States. It would be absurd to say that they had greater rights. We have seen that the right to sell intoxicating liquors is not a right inherent in a citizen, and is not one of the privileges of American citizenship; that it is not within the protection of the fourteenth amendment; that it is within the police power. The police power is a right reserved by the States, and has not been delegated to the General Government. In its lawful exercise the States are absolutely sovereign. Such exercise can not be affected by any treaty stipulations.

In addition to the cases that I have cited, and in closing the entire reference, I desire to now advert to several diplomatic precedents of great value upon this subject. The first incident took place during the administration of Mr. Marcy over the Department of State, and I quote his opinion in the matter:

[Mr. Marcy, Secretary of State, to Mr. Mason, minister to France, September 11, 1854.]

It is not, as you will preceive by examining Mr. Drouyn de L'Huys's dispatch to the Count de Sartiges, the application of the "principle" to the particular case of M. Dillon which is to be disavowed, but the broad and general proposition that the Constitution is paramount in authority to any treaty or convention made by this Government. This principle, the President directs me to say, he can not disavow, nor would it be candid in him to withhold an expression of his belief that if a case should arise presenting a direct conflict between the Constitution of the United States and a treaty made by authority thereof, and be brought before our highest tribunal for adjudication, the court would act upon the principle that the Constitution was the paramount law.

The second incident also took place during the administration of Mr. Marcy:

[Mr. Marcy, Secretary of State, to Mr. de Figaniere, Portuguese chargé d'affaires, March 27, 1855.]

Although the language of Article II of the consular convention between the United States and France of February 23, 1853, exempting consuls from compulsory process, is general and unrestricted in terms, "yet it is here held that it does not take away the right which the defendant in a criminal prosecution has to resort to such process to procure the witnesses in his favor, for this right is secured to him by the express language of the United States Constitution." That instrument is paramount in authority to the laws of Congress or of any of the States, and to all treaty stipulations.

At a very late date the question arose with the Department of State, presided over by Secretary Hay, and I read the conclusion that the Secretary reached upon this subject, quoting from Mr. Moore's valuable treatise upon international law:

July 19, 1899, the Department of State declined a proposal of the British Government to negotiate a treaty to prevent discriminatory legislation by the several States of the United States, subjecting foreign fire-insurance companies to higher taxes than domestic companies. The reason given for the declination was that the negotiation of such a treaty would probably be futile on account of the indisposition of the people to permit any encroachment upon the exercise of powers of the local legislation.

ARE THE PUBLIC SCHOOLS OF CALIFORNIA THE PROPERTY OF CALIFORNIA OR OF THE UNITED STATES?

Is it necessary for me to say anything further? Are the public schools of California the property of California or the property of the United States? Does the public school system of California or of any other State belong to the State that creates and supports it, or to the Government that has neither created nor sustained it? Does this subject come within the treaty-making power? Does it come within the delegated powers of the Constitution? Have the United States the right to incorporate into a treaty a provision that the States shall, out of their own treasury, educate the citizens of foreign governments? Is there any power in any treaty to deprive any of the States of their reserved right to regulate and manage their local affairs according to their own usages and statutes? Are not foreign governments that deal with us presumed to know the nature and the character of our institutions, and is not this principle fully established by an unbroken line of precedents passed upon by the State Department from time immemorial? There can be but one response to all these inquiries, in my opinion, and as the result of the investigation that I have given to this subject I now assert, in the language of the resolutions, that the public school systems of the States belong to the States along with all of their reserved rights; that the Government has no power whatever to meddle with them or control them, and it was the duty of the President to have informed the Government of Japan as soon as the question arose, no matter what his feelings or sentiments may have been, that the subject was entirely without the domain of his jurisdiction.

THE CONCLUSIONS I HAVE REACHED.

I shall now, in conclusion, summarize the results that I have reached. I am not here for the purpose of denying to the Government the power to cover by treaty every right, privilege, and concession that comes within the treaty-making power in order to carry out the objects and purposes of this Government as defined in the Constitution. I do not for a moment set up the reserved rights of the States against the exercise of any constitutional power that may be incorporated in a treaty. I admit that the United States can enter into any treaty with any foreign power in reference to any subject embraced in the Constitution. I deny, however, that it possesses any inherent right to make a treaty, and I claim that the treaty-making power lies in grant and not in sovereignty and must be construed *in pari materia* with all the other clauses of the instrument that creates it, and that in interpreting the treaty-making power we must be governed by the principles of international law, its

usages and its practices, as those principles, usages, and practices appertain to our form of constitutional government. I utterly deny that we have any right to make a treaty that violates the Constitution, or deprives the States of their reserved rights to conduct their local affairs over which the Federal Government has no jurisdiction, and which they alone have the right to administer according to their own constitutions and statutes.

THE RESERVED RIGHTS OF THE STATES.

As I said at the commencement, this is a grave and profound question that we have encountered. The local problem sinks into insignificance beside the great principle that is here involved. It affords a timely warning and admonition that at any time, through the treaty-making power, a deadly blow may be aimed at the entire fabric of our institutions, and they can be leveled to the ground. If the President can practically make a treaty, and that is what he is doing in other directions, and dispose of the reserved rights of the States, then the treaty-making power is above and beyond the Constitution, and the supremacy of the States within their own borders departs and vanishes forever. If the Democratic party accepts such a doctrine as this, then it has also parted with its birthright and abandoned the historic ground upon which it has stood for over a century. I believe in the complete exercise by the Federal Government of every Federal power contained in the Constitution, but beyond the delegated powers and the right to pass all laws necessary to execute the delegated powers, I would never justify the slightest encroachment upon the reserved rights of sovereign States within their own borders. In the night of our despair, this reserved right of the States is the only constellation that for our party has no "fellow in the firmament." We were born under its horoscope, and if there is any life left in us we must forsake the worship of grotesque and meaningless idols and follow it like a pillar of fire to the land of our nativity.

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